

In the Matter of )  
 )  
VONAGE HOLDINGS CORPORATION )  
 )  
Petition for Declaratory Ruling Concerning )  
an Order of the Minnesota Public )  
Utilities Commission )

## COMMENTS OF MINNESOTA INDEPENDENT COALITION

627615/2

## **SUMMARY**

Vonage Holdings Corporation's ("Vonage") petition for declaratory judgment should be denied because: 1) Vonage's petition is based on imagined harms, which are purely speculative and lack any credible factual basis; and 2) Vonage does not meet the criteria for preemption; 3) Vonage's service does not meet the criteria of either an enhanced service or an information service; and 4) Vonage's petition violates the principle of technological neutrality which requires that regulatory status be based on the characteristics of the service, not on the technology used to provide the service.

Vonage's petition for declaratory ruling is based on the premise that the Minnesota Public Utilities Commission ("MPUC") will impose impossible requirements that will force Vonage to cease its intrastate business operations in Minnesota. To the contrary, the Minnesota 911 requirements are applied flexibly and the MPUC has been very accommodating to competitive local exchange carriers ("CLECs"). Vonage's claims that it will be impossible to comply with MPUC requirements are no more than speculation lacking in any credible factual foundation. The Commission should ignore those claims.

Second, none of the three grounds for preemption asserted by Vonage are legally adequate.

There is no provision of the Federal Act that conflicts with a State's regulation of the type of VoIP service provided by Vonage. In contrast to the express provisions of Sections 253(a) and 332(c)(3), there are no provisions of the Federal Act that preclude a State from regulating a service which the provider holds out as a replacement for telephone service. Section 230 does not justify preemption because: 1) the Vonage service is neither an "interactive computer service" nor the "Internet" within that meaning of Section 230; and 2) Section 230 is intended to protect providers from liability based on the content of communications, not the authority of

state telecommunications regulatory entities. Vonage's reliance on the Commission's 1998 *Report to Congress* is misplaced because that *Report* is neither an order nor a rule and because Vonage has misapplied the tentative criteria of that *Report*.

Compliance with both state and federal law is not physically impossible. The MPUC order would not require Vonage (or its customers) to use physically separate equipment facilities for intrastate traffic. Further, there is no indication that Vonage would be required to block traffic of any type, much less any interstate traffic.

The MPUC Order does not stand as an obstacle to the accomplishment of Congress' objectives. Neither Congress nor the Commission has expressed the intention to totally bar state regulation of the VoIP service provided by Vonage. The *Report to Congress* recognizes that there is no categorical exemption for every service that uses IP or touches the Internet. Under the tentative criteria of the *Report to Congress*, Vonage's VoIP service is telecommunications.

Third, the Vonage's service does not meet the criteria of either an information service under the Act and the *Report to Congress* or an enhanced service under Rule 64.702. It does no more than convert voice communications back and forth between technologies, a process that is now routine in the telecommunications industry.

Finally, the Vonage petition violates the principle of technological neutrality. Under that principle, the function being provided to customers is the key criteria, rather than the criteria used. Under that principle, the Vonage VoIP service is clearly telecommunications.

**I. VONAGE’S PETITION IS BASED ON IMAGINED HARMS, WHICH ARE PURELY SPECULATIVE AND LACK ANY CREDIBLE FACTUAL BASIS.**

Vonage’s argument rests heavily on imaginary consequences (of being forced out of business and forced to block traffic, including interstate traffic) as a result of 911 requirements.<sup>1</sup>

Vonage asserts that it will not be allowed to use ILEC facilities to route 911 calls (Vonage Petition at p. 9) and that the MPUC will inflexibly apply the Minnesota 911 requirements to prevent Vonage from obtaining MPUC certification as a Competitive Local Exchange Carrier (“CLEC”) in Minnesota.<sup>2</sup> These dire predictions lack any factual or legal support.

Vonage asserts that: “because Vonage is an [ISP], not a telecommunications carrier, it has not been able to route traffic directly to the E911 trunks operated by [ILECs]. Section 251(c)(1) of the Act requires [ILECs] to provide interconnection to these trunks to other telecommunications carriers, but not to [ISPs].”<sup>3</sup> However, Vonage’s argument is circular, being based on Vonage’s conclusion that it is not a telecommunications carrier.

Vonage’s ability to obtain access to LEC facilities is assured by the Minnesota Rules. As the MPUC Order concluded, Vonage is offering local telephone service within the meaning of Minnesota law.<sup>4</sup> As a result, Vonage is a CLEC under Minnesota law.<sup>5</sup>

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<sup>1</sup> Vonage’s dire predictions include assertions that: (i) “any practical effort to comply with Minnesota’s regulatory system ... undoubtedly would require blocking of at least some interstate traffic” (Vonage Petition at p. v); (ii) “because Vonage cannot comply with Minnesota 911 requirements, Vonage cannot satisfy the Minnesota PUC Order and will be forced to discontinue “intrastate” service in Minnesota” (Id. at p. 29); (iii) “the Minnesota PUC cannot enforce its Order with respect to Vonage’s intrastate services without also interfering with Vonage’s ability to provide at least some jurisdictionally interstate services” (Id.); (iv) “Vonage has no way of assuring that it is in compliance with the Order unless it blocks a substantial amount of interstate traffic as well” (Id.); and (v) “because Vonage cannot comply with the 911 requirements, the Minnesota PUC Order effectively requires Vonage to cease completing intrastate “calls” in Minnesota. Vonage has demonstrated that it is impossible to do this without also blocking a significant amount of interstate traffic.” (Id. at 31.)

<sup>2</sup> Id. at pp. 25, 29, 31.

<sup>3</sup> Id. at p. 9.

<sup>4</sup> Order Finding Jurisdiction and Requiring Compliance, In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota, Docket No. P-6214/C-03-108, September 11, 2003 (“*MPUC Order*”), at p. 8.

A CLEC under Minnesota law has the right to use ILEC facilities needed for the CLEC to provide 911 service.<sup>6</sup> As a result, it is clear that, if Vonage had proceeded with the Minnesota certification process as a CLEC, it would have found that its imaginary problems with obtaining access to LEC networks would be solved.

Vonage also predicts that the Commission would apply the Minnesota 911 Rules inflexibly, precluding Vonage from obtaining approval of a 911 plan.<sup>7</sup> To the contrary, the Minnesota 911 Statutes and Rules provide for flexible application, taking into account technological limitations.

Minn. Stat. Section 403.06, subd. 2, expressly recognizes the providers should not be required to comply with economically infeasible 911 requirements, reading in part:

Any ... wire line telecommunications service provider may petition the department of administration for a waiver of all or portions of the [911] requirements. A waiver may be granted upon a demonstration by the petitioner that the requirement is economically infeasible.

Minnesota Rules confirm that 911 requirements are to be applied flexibly. Minn. Rule 7812.0550, subp. 3, lists criteria to be considered in review of a 911 plan and provides that the

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<sup>5</sup> Minn. Rule 7812.0100, subp. 12, reads in part:

“Competitive local exchange carrier” or “CLEC” means:

A. a telecommunications carrier that is certified by the [MPUC] to provide local service ... .

Minn. Rule. 7812.0100, subp. 46, defines “telecommunications carrier” for purposes of Minnesota Rules by reference to Minnesota statutes:

“Telecommunications carrier” means a ... firm... as defined in Minnesota Statutes, section 237.01, subdivision 6.

Minn. Stat. § 237.01, subd. 6, reads in part:

“Telecommunications carrier” means a ... firm ... authorized to furnish one or more of the following telephone services to the public ... : (3) local service pursuant to a certificate granted ... after August 1, 1995 ... .

<sup>6</sup> Minn. Rule 7812.0550, subp. 2, reads in part:

**LEC Cooperation.** A LEC shall provide a CLEC with the access to facilities and information necessary to enable the CLEC to meet its 911 service obligations.

<sup>7</sup> Vonage Petition at pp. 25, 29, 31.

MPUC “shall consider, at a minimum, the [CLEC’s] ability and intent ... .” Minn. Rule 7812.0550, subp. 4, confirms that the Minnesota Rules are not to be rigidly applied, stating:

**Use of decision criteria.** The factors identified in subpart 3, items A to K, must be considered as criteria to assist the commission in its evaluation of the adequacy of 911 plans. *No one factor may be considered dispositive.* (Emphasis added.)

As a result, there is no legal basis for Vonage’s prediction that the 911 requirements would be rigidly applied by the MPUC to preclude it from obtaining certification as a CLEC.

Substantive provisions relating to 911 service are set forth in Minn. Rules Chapter 1215, and also provide for flexible application, including express provisions that a variance from design standards based on the equipment used by a carrier.<sup>8</sup> The Minnesota Statutes and Rules refute Vonage’s predictions of rigid application of impossible criteria by the MPUC.

The MPUC’s record also shows that it is very accommodating to CLECs, and there is no reason to believe that it would be less so in dealing with certification of Vonage as a CLEC. There are approximately 165 CLECs certified to provide local service in Minnesota.<sup>9</sup> Based on reporting by only 15 of those CLECs<sup>10</sup>, CLECs serve 17% of the access lines in Minnesota,<sup>11</sup> well above the national average of 13%.<sup>12</sup> The MPUC Staff comments confirm that the MPUC does not intend to preclude Vonage from obtaining certification as a CLEC.<sup>13</sup>

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<sup>8</sup> Minn. Rule 1215.1000, subp. 2, reads in part:

A clear showing of either of the following shall serve as just cause for the granting of a variance:

A. The equipment of the serving telephone utility(ies) is of such design ... that it is not possible or practical to design a 911 telephone system that conforms to established design standards. ....

<sup>9</sup> A list of CLECs certified in Minnesota is maintained by the Minnesota Department of Commerce.

<sup>10</sup> Table 12 of “Local Telephone Competition: Status as of December 31, 2002” Industry Analysis and Technology Division Wireline Competition Bureau, June 2003.

<sup>11</sup> *Id.* at Table 6.

<sup>12</sup> *Id.*

<sup>13</sup> MPUC Staff commented on Vonage’s Petition for a Stay, which was based on many of the same arguments as presented to the Commission, saying:

The [MPUC] did not tell Vonage that it could not do business in Minnesota, ... . [Vonage’s] claim that it could not get a certificate, or approval of a 911 plan, is speculative. If the time period in the Order was inadequate, Vonage could have requested an extension.

In short, there is no credible basis to conclude that compliance with MPUC regulatory requirements will require Vonage to cease business operations in Minnesota or to block any calls, much less interstate calls.

## **II. NONE OF THE GROUNDS FOR PREEMPTION ASSERTED BY VONAGE ARE LEGALLY ADEQUATE.**

Vonage asserts three grounds for preemption: 1) that there is an outright conflict between federal and state law; 2) that compliance with both federal and state law is physically impossible; and 3) that state law is an obstacle to accomplishment of Congress objectives. None of these conditions is present.

### **A. There Is No “Outright Or Actual Conflict” Between State And Federal Law That Would Justify Preemption.**

There is no provision of federal law that is in outright or actual conflict with state regulation of the portion of Vonage’s service that is telecommunications.

#### **1. Section 230 does not apply to Vonage’s VoIP Service or to State regulation of VoIP service.**

Vonage relies heavily on Section 230(b) for its argument that the MPUC is absolutely precluded from any regulation of Vonage.<sup>14</sup> Vonage’s reliance is misplaced because Section 230 does not address, much less preclude, State regulation of telecommunications service, and there is no conflict between regulation of the VoIP and because the VoIP service provided by Vonage is not within the scope of Section 230.

Sections 230(a) and (b) provide the preamble to the operative provisions of Section 230, the Communications Decency Act, reciting the findings and purpose of that Act. However, the

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[W]hile staff cannot speak for the 911 authorities, it is staff’s recollection that both they and Vonage expressed an interest in working together to resolve problems. [MPUC] Staff Briefing Papers for October 9, 2003 Meeting at pp. 3, 4.

<sup>14</sup> Vonage Petition at pp. 1, 2, 19, 28, 31.

preamble of a statute is not an operative part of the statute.<sup>15</sup> Accordingly, the provisions of Section 230(b) are not operative provisions and certainly should not be construed as operative to a subject matter (state regulation of VoIP services) that was unrelated to the subject matter of the Communications Decency Act.

The protections granted by Section 230 were unrelated to regulation of local service by state regulatory commissions. Rather, Section 230 was intended to protect service providers from liability for the content of communications provided by other persons. As the court noted in *Zeran v. America Online*:<sup>16</sup>

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech.<sup>17</sup>

Section 230 lacks any expression of Congressional intent to preempt state regulation of VoIP service.

Further, Section 230 is directed to protecting the content of communications over “Interactive computer service” and the “Internet,” as defined in Section 230(f).<sup>18</sup> Vonage’s VoIP

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<sup>15</sup> *Association of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (“A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and does not enlarge or confer powers on administrative agencies or officers.”); *Lehigh & New England Ry. Co. v. I.C.C.*, 540 F.2d 71, 79 (3d. Cir 1976) (“L&NE argues that a preamble cannot confer powers on the Commission that are not conferred by the operative language of the statute. (Footnote omitted) But we have not concluded that the preamble to the Rail Act confers powers on the ICC not granted by the operative language of the statute.”).

<sup>16</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327 (4<sup>th</sup> Cir. 1997).

<sup>17</sup> 129 F.3d at 330.

<sup>18</sup> Section 230(f) reads in part:

- (1) The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.
- (2) The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

service provides real time voice communications and does not meet either definition. As a result, Section 230 does not provide any basis for preemption.<sup>19</sup>

**2. The absence of any express provisions regarding VoIP is in sharp contrast to other provisions of the Act.**

The Act demonstrates that Congress has had no difficulty providing clear direction when there is an outright or actual conflict between state and federal law or in providing express exemption from state authority when that is its intent. The absence of similar provisions in regards to VoIP indicates that there is no such conflict.

Section 253<sup>20</sup> expressly describes the circumstances under which State law must yield to federal law and policy for the promotion of competition. However, even in that situation, States may apply regulations for public safety so long as those regulations are applied in a competitively neutral manner.<sup>21</sup> Vonage's petition would categorically deny the States the opportunity apply public safety requirements on VoIP providers without any comparable expression for of Congressional intent.

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<sup>19</sup> The District Court in Minnesota relied heavily on Section 230(f) in its MEMORANDUM OPINION AND ORDER, dated October 16, 2003, *Vonage Holdings Corporation v. Minnesota Public Utilities Commission, et. al.*, Civil File No. 03-5287 (MJD/JGL): "Congress has expressed a clear intent to leave the Internet free from undue regulation . . . ." (At p. 1); "Congress has spoken with unmistakable clarity on the issue of regulating the Internet: (quotation of 47 U.S.C. ¶ 230(b) omitted)" (At p. 8); "Because Congress has expressed an intent that services like Vonage's must remain unregulated, . . . preemption is necessary." (At p. 17); "The Court concludes that based on the previously-discussed congressional intent to leave Internet and information services unregulated, granting a permanent injunction is in the public interest." (At p. 22).

<sup>20</sup> 47 U.S.C. § 253(a) reads:

No State or local statute ore regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

<sup>21</sup> 47 U.S.C. § 253(b) reads:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Section 332(c)(3)<sup>22</sup> expressly exempts CMRS providers from rate and entry regulation, but expressly preserves the State authority to regulate “other terms and conditions of [CMRS] services.” Vonage’s petition seeks to deny the States comparable authority over VoIP services in the absence of any express authority under the Act.

The absence of any indication of preemptive provisions under the Act show that Congress did not intend that States be precluded from regulation of all VoIP services.

**B. Compliance With Both Federal And State Law Is Not Physically Impossible.**

Vonage has not shown that there is any physical impossibility to comply with both State and Federal regulatory regimes. Physical impossibility has been found where State requirements would require that duplicate physical facilities, such as telephones or network facilities, would be required<sup>23</sup> or where a single activity would need to occur in mutually exclusive ways.<sup>24</sup> Impossibility has not been found where separate regulatory constructs are applied to a single network.<sup>25</sup> To the contrary, Section 2(b) is based on the premise that separate state and federal regulatory constructs will be applied to a single physical network.<sup>26</sup>

Vonage’s claims of physical impossibility is based on the imaginary problem that it will be required to block intrastate traffic and the difficulty of identifying the jurisdiction of an individual call (so only intrastate calls are blocked).<sup>27</sup> However, as previously discussed, there is no credible basis for Vonage’s assumption that any traffic would be blocked. The concurrent operation of state and federal regulatory regimes does not require the identification of the jurisdiction of individual calls. To the contrary, regulatory requirements are applied based on

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<sup>22</sup> 47 U.S.C. § 332(c)(3).

<sup>23</sup> *North Carolina Util. Comm’n v. F.C.C.*, 522 F.2d 1036 (4<sup>th</sup> Cir), cert. denied 434 U.S. 874 (1977); *California v. F.C.C.*, 905 F.2d 1217 (9<sup>th</sup> Cir 1990).

<sup>24</sup> *Illinois Bell Tel. Co. v. F.C.C.*, 883 F.2d 104, 115 (D.C. Cir 1989).

<sup>25</sup> *Louisiana v. F.C.C.*, 476 U.S. 355 (1986).

<sup>26</sup> 476 U.S. at 374.

overall estimates of the jurisdiction of traffic, as approached to both interexchange traffic and CMRS traffic show.

Accordingly, there is no factual support for an argument based on impossibility.

**C. State Law Is Not “An Obstacle To Accomplishment And Execution Of The Full Objectives Of Congress.”**

Vonage attempts to characterize its request for preemption as narrow.<sup>28</sup> To the contrary, it is instead a request for categorical elimination of local regulation that would presumably apply to all other states as well. Such a broad and categorical request for preemption could be justified only if all forms of State regulation would necessarily frustrate federal regulatory goals. Vonage has totally failed to make that showing.

The showing that is required to support such a broad form of preemption was explained in *People of State of Cal. v. F.C.C.*<sup>29</sup>:

The FCC may not justify a preemption order merely by showing that *some* of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals. Rather, the FCC bears the burden of justifying its *entire* preemption order by demonstrating that the order is narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals.<sup>30</sup> (Emphasis original.)

The Court further explained the showing that is needed for preemption on such a basis and the requirement that FCC preemption be limited to only state regulation that would frustrate federal goals:

As the D.C. Circuit held in *NARUC III*, “a valid FCC preemption order must be limited to [state regulation] that would *necessarily* thwart or impede” the FCC’s goals. *Id.* at 430 (emphasis added). “The FCC has the burden . . . of showing *with some specificity* that [state regulation] . . . would negate the federal policy. . . .” *Id.* (emphasis added). We are therefore faced with the task of deciding whether the FCC’s regulation of interstate enhanced services would necessarily be frustrated by all possible forms of state-imposed structural separation requirements and by all

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<sup>27</sup> Vonage Petition at pp. 27-31.

<sup>28</sup> *Id.* at p. 27.

<sup>29</sup> 905 F.2d 1217 (9<sup>th</sup> Cir. 1990).

<sup>30</sup> 905 F.2d at 1243.

state-imposed non-structural safeguards that are inconsistent with *Computer III* requirements.

Our review of the record fails to persuade us that the *Computer III* preemption orders are “limited to [state regulation] that would necessarily thwart or impede” valid FCC goals.<sup>31</sup> (Emphasis original.)

Vonage has similarly failed to show that all forms of regulation by the State of Minnesota would necessarily frustrate the regulatory goals of either the Act or the Commission.

There are no federal goals that would be frustrated by the Minnesota applying its consumer protection and customer service quality regulation to Vonage to the extent that Vonage is providing intrastate service. As previously discussed, there is also no indication that the MPUC would exclude Vonage from providing service.

### **III. VONAGE’S TELEPHONE SERVICE IS NEITHER AN INFORMATION SERVICE NOR AN ENHANCED SERVICE.**

The District Court treated the *Report to Congress* as though it had the force of law.<sup>32</sup> However, the *Report to Congress* is neither a rule nor an order, and it does not control the outcome of this case. Rather, as the *Report to Congress* expressly stated, it merely reflected the Commission’s tentative intent and that specific decisions would require “more focused records.”<sup>33</sup>

The *Report to Congress* clearly recognized that the provider’s intent and the service being offered are key to classification of a service under the Act and distinguished telecommunications service providers from ISPs who would not know what their networks are being used for:

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<sup>31</sup> Id.

<sup>32</sup> MEMORANDUM OPINION AND ORDER: “In applying the FCC four phone-to-phone IP telephony conditions to Vonage, it is clear that Vonage does not provide phone-to-phone IP telephony service. Vonage’s services do not meet the second and fourth requirements.” At p 13. *See also*, discussion at pp. 13-16.

<sup>33</sup> At ¶ 91.

In the case of “computer-to-computer” IP telephony, individuals use software and hardware at their premises to place calls between two computers connected to the Internet. The IP telephony software is an application that the subscriber runs, using Internet access provided by its Internet service provider. The Internet service providers over whose networks the information passes may not even be aware that particular customers are using IP telephony software, ...<sup>34</sup>

In contrast to such IPS, Vonage holds out its VoIP service as a replacement for a customer’s current local and long distance services and uses the North American Numbering Plan (“NANP”) to assign numbers to its customers. Use of numbers from the NANP distinguished the Vonage VoIP service from the computer-to-computer services provided through ISPs. The use of numbers from the NANP also shows that the Vonage VoIP service is, and is intended to be, the functional equivalent of telephone service provided by ILECs and other CLECs.

The Commission has clearly recognized the importance of what the provider is offering to the public:

As a general matter, Title II requirements apply only to the “provi[sion] “ or “offering” of telecommunications. Without regard to whether “telecommunications” is taking place in the transmission of computer-to-computer IP telephony, the Internet service provider does not appear to be “provid[ing]” telecommunications to its subscribers.<sup>35</sup>

The MPUC Order clearly focused on the offering made by Vonage and its own description of the service that it was “offering” to the public.<sup>36</sup> Such an approach is consistent with the principle of technological neutrality.

The *Report To Congress* also identified a set of tentative criteria for determining whether a VoIP service is telecommunications:

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<sup>34</sup> At ¶ 87.

<sup>35</sup> At ¶ 87.

<sup>36</sup> The MPUC Order reads in part:

The [MPUC] finds that what Vonage is offering is two-way communication that is functionally no different from any other telephone service. ... At p. 8.

In using the term “phone-to-phone” IP telephony, we tentatively intend to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.<sup>37</sup>

While the *MPUC Order* did not attempt to make a classification of the Vonage service under the Federal Act, it did address the tentative criteria of the *Report to Congress*.<sup>38</sup> Vonage’s VoIP service meets each of these criteria.

Vonage is clearly holding itself out as providing voice telephony and clearly provides access to telephone numbers assigned as part of the NANP.

Vonage also transmits customer information without any “net change in form or content.” A Vonage’s customer’s voice communications enter the system as voice communication and leave as voice communication. It is not changed from voice to written text, is not stored, and is not otherwise transformed in any way (e.g., translated from one language to another). Vonage asserts that there is a net protocol conversion between “IP to TDM” as part of the Vonage VoIP service for all calls between a Vonage customer and a customer on the PSTN.<sup>39</sup> Assuming that this is factually correct, changing the technological format of voice communications is now a routine part of telecommunications. The technological format of virtually all voice

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<sup>37</sup> At ¶ 88.

<sup>38</sup> The MPUC Order reads in part:

To address this matter, the [MPUC] has examined the service that Vonage provides. ... Vonage itself holds itself out as providing all-inclusive home phone service and advertises that it replaces a customer’s current phone company.

With the Vonage service the customer used an ordinary touch-tone phone to make calls and carry on conversations. ... Although the phone is plugged into an MTA router which, in turn, is plugged into the modem, the consumer is being provided with service that is functionally the same as any other telephone service. Further, the Vonage service intersects with the public switched telephone network. At p. 8.

communications are transformed during transmission, whether from analog to digital and back to analog or from wireline to wireless forms. Vonage's VoIP service does nothing of any more significance. The significance of such changes has disappeared in the 23 years since Rule 64.702 was adopted, and technological neutrality precludes a different result for IP technology.

Vonage also relies on a customer's use of modems, routers, and possibly a "multimedia terminal adopted."<sup>40</sup> While these elements appear to be used in connection with the Vonage VoIP service, it is clear that a Vonage customer can use standard touch-tone CPE. Nothing in the Vonage VoIP service prevents use of standard touch-tone CPE, which distinguishes the Vonage VoIP service from "computer-to-computer" telephony as described in the *Report to Congress*. Further, a regulatory test or distinction based on the type of CPE used is bound to fail. Rather, the status of a service under the Act should be based primarily on the function performed and the manner in which the provider holds the service out to the public.

The *Report to Congress* recognizes the distinction between those that merely provide CPE and those that also provide transport:

Companies that *only* provide software and hardware installed at customer premises do not fall within this category, because they do not transmit information. These providers are analogous to PBX vendors, in that they offer customer premises equipment (CPE) that enables end users to engage in telecommunications by purchasing local exchange and interexchange service from carriers. *These CPE providers do not, however, transport any traffic themselves.*<sup>41</sup>

Vonage is clearly holding itself out as providing transport, which is the essence of telecommunications. The use of IP technology and the Internet as the transportation medium does not alter the status of Vonage's service as telecommunications any more than a reseller's use of another carrier's network alters the status of the reseller's service.

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<sup>39</sup> Vonage Petition at p. 6.

<sup>40</sup> Vonage Petition at pp. 5-6.

The Vonage VoIP service is clearly not an “information service” within the meaning of the Act. Both the definition of “information services” and the manner in which that term is used in the Act demonstrate the distinction.

The definition of information services reads in part:

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing

...

Clearly, an “information service” involves something other than real-time delivery of unaltered voice conversations between parties. The context in which the term “information service” is used in the Act confirms that conclusion. “Information services” include: pay per call services<sup>42</sup> and some types of “interactive computer services”.<sup>43</sup> “Information services” are distinguished from “advanced telecommunications services.”<sup>44</sup>

The function performed by Vonage is also not an “enhanced service” within the meaning of Rule 64.702.<sup>45</sup> Rule 64.702 was adopted in 1980 at a time when the technology used to provide telecommunications (and enhanced services) was far less refined than at present. Distinctions between telecommunications and enhanced services that were meaningful in 1980 should not be mechanically applied in 2003. Accordingly, no weight should be given to Vonage’s claims that it provides an enhanced service by “changing the form of the information” from IP to TDM.<sup>46</sup> Virtually all telecommunications involves a change in the form of communication (from analog to digital and, often between wireline to wireless). Virtually all telecommunications also involves the providers using “computer processing applications that act

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<sup>41</sup> At ¶ 86.

<sup>42</sup> 47 U.S.C. § 228(c)

<sup>43</sup> (47 U.S.C. § 230(e)

<sup>44</sup> 47 U.S.C. § § 254(b)(3) and (h)(2).

<sup>45</sup> 47 C.F.R. § 64.702.

on format,” which shows that Vonage is not unique in that respect.<sup>47</sup> Vonage’s reliance on 20 year old distinctions, including “net protocol conversions”<sup>48</sup> should also be rejected because the distinctions are obsolete.

#### **IV. GRANTING VONAGE’S PETITION WOULD IGNORE THE PRINCIPLE OF TECHNOLOGICAL NEUTRALITY.**

While that *MPUC Order* did not purport to base its decision on federal law, it focused on the service a function being provided and the manner in which Vonage held its service out to the public, and result of the *MPUC Order* is consistent with federal law.<sup>49</sup>

The Commission has recognized that the classification of a service under the Act is based on the nature of the end user offering:

As we have observed above in our general discussion of hybrid services, *the classification of a service under the 1996 Act depends on the functional nature of the end-user offering*. Applying this test to IP telephony, we consider whether any company offers a service that provides users with pure “telecommunications.”<sup>50</sup>

The Commission has embraced the principle of competitive neutrality and the corollary principle of technological neutrality.<sup>51</sup> The Commission has also recognized that the principle of

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<sup>46</sup> Vonage Petition at p. 12.

<sup>47</sup> Vonage Petition at p. 13.

<sup>48</sup> *Id.*

<sup>49</sup> The *MPUC Order* reads in part:

To address this matter, the [MPUC] has examined the service that Vonage provides. ... Vonage itself holds itself out as providing all-inclusive home phone service and advertises that it replaces a customer’s current phone company.

...

The [MPUC] finds that what Vonage is offering is two-way communication that is functionally no different from any other telephone service. ... At p. 8.

<sup>50</sup> *Report to Congress* at ¶ 86.

<sup>51</sup> Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776 (1997), ¶¶ 47 – 49; Federal-State Joint Board on Universal Service, *Fifth Report and Order*, 13 FCC Rcd. 21323 (1998), ¶ 9; Federal-State Joint Board on Universal Service, *Ninth Report and Order*, 14 FCC Rcd. 20479 (1999), ¶¶ 18, 89; Federal-State Joint Board on Universal Service, *Fourteenth Report and Order*, 16 FCC Rcd 11244 (2001), ¶ 14.

technological neutrality applies when a determination is made regarding categorization of a service. For example, the *Report to Congress* reads in part:

We are mindful that, in order to promote equity and efficiency, *we should avoid creating regulatory distinctions based purely on technology*. Congress did not limit “telecommunications” to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users.<sup>52</sup> (Emphasis added.)

While that comment was made in the context of universal service, the logic and Congress’ definition apply with equal force in the present context.

The *Report to Congress* also recognized that the services provided by different technologies are functionally substitutable:

An end user that shifts its local exchange service from an incumbent local exchange carrier (LEC) to a competitive LEC, or to a wireless carrier, is purchasing a *functionally identical service* using different providers or technologies.<sup>53</sup> (Emphasis added.)

Similarly, the *Report to Congress* notes:

[U]sers of certain forms of phone-to-phone IP telephony appear to pay fees for the sole purpose of obtaining transmission of information without change in form or content. Indeed, from the end-user perspective, these types of phone-to-phone IP telephony service providers seem virtually identical to traditional circuit-switched carriers.<sup>54</sup>

The *MPUC Order* is supported by the principle of technological neutrality. Preempting the MPUC Order would violate that core principle.

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<sup>52</sup> At ¶ 98.

<sup>53</sup> At ¶ 99.


<sup>54</sup> At ¶ 101.

**CONCLUSION.**

For the reasons set forth above, the Vonage Petition should be rejected.

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